In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-838

HOSPITAL AND INSTITUTIONAL WORKERS LOCAL 250, AFL-CIO,

Petitioner,

VS.

MERCY HOSPITALS OF SACRAMENTO, INC., and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Hospital and Institutional Workers, Local 250, SEIU, AFL-CIO, intervenor in the court below, hereby respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I

OPINIONS AND ORDERS BELOW

The Opinion of the Court of Appeals is unreported as yet and appears as Appendix "A". This opinion denied enforcement and remanded a "Decision and Order" of the National

Labor Relations Board, which is reported at 224 NLRB 419, and appears as Appendix "B". The "Order" denying a Petition for Rehearing appears as Appendix "C". The "Decision on Review and Direction of Elections" in the underlying representation case is reported at 217 NLRB 765 and appears as Appendix "D".

II

JURISDICTION

The Opinion of the court was filed on June 12, 1978. A timely petition for rehearing was denied on August 25, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III

QUESTION PRESENTED

Where the National Labor Relations Board modifies stipulated bargaining units, must the employer utilize the reconsideration procedures of the Board prior to the Board conducted election in order to preserve the propriety of the unit change for judicial review under U.S.C. § 160(e)?

IV

STATUTE AND RULES AND REGULATIONS INVOLVED

29 U.S.C. §160(e) provides in relevant part:

> "The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which the application be made are on vacation, any district court of the United States, within any circuit or district, respectively, where any unfair labor practice occurred, or where such person resides or

> transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28, United States Code. • • • No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances."

29 C.F.R. § 102.65(e)(1) states in pertinent part:

> "A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision for reconsideration or rehearing, except that no motion for reconsideration or rehearing will be entertained pursuant to this paragraph by the regional director with respect to any matter which can be raised before the Board pursuant to any other section of the Rules in this part, or by the Board with respect to any matter which could have been raised but was not raised before it pursuant to any other section of these Rules."

V

SUMMARY OF THE ARGUMENT

The issue presented arises in the context of a representation proceeding pursuant to Section 9 of the National Labor Relations Act, 29 U.S.C. § 159. This proceeding arises after the effective date of the health care amendments to the National Labor Relations Act, which brought within the jurisdiction of the Board employees within the health care field. 88 Stat. 395 (1974).

Petitioner, Hospital and Institutional Workers, Local 250, SEIU, AFL-CIO (hereinafter "Local 250") and the em-

ployer, the Mercy Hospitals of Sacramento, Inc. (hereinafter "Mercy Hospital") stipulated during the course of the representation proceedings that two appropriate units of employees existed within this acute care hospital facility. Broadly defined, those units consisted of a maintenance-and-service unit and a clerical employee unit. Subsequently, on review, the National Labor Relations Board set aside the stipulated units, and modified them by shifting a small group of "in-plant" clericals from the clerical unit to the service-and-maintenance unit. App. pp. 45-46. An election was thereafter conducted in the slightly modified service-and-maintenance unit, which was won by the unions involved.[1] During the intervening period, after the Board modified the stipulated unit and before the date upon which the election was conducted in the bargaining unit, Mercy Hospital did not raise any objection to the modification of the unit. The hospital ignored the Board's procedure for reconsideration of the decision. 29 C.F.R. § 102.65(e)(1).

Thereafter, several months later, Mercy Hospital first objected to the setting aside of the stipulated unit and refused to bargain with the unions involved.

The issue raised concerns the preservation of the integrity of the adjudicatory process of the National Labor Relations Board. In excusing use of the reconsideration process, the court below has effectively deleted the reconsideration rule and has created disarray in the courts of appeal with respect to the obligation of parties to representation proceedings to utilize the reconsideration procedure, particularly where the Board's action is *sua sponte*.

[1]Local 250 was joined as a joint petitioner with Local 39, International Union of Operating Engineers in the service-and-maintenance unit.

VI

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT WHICH HAS NOW BEEN CREATED AMONG THE CIRCUITS WITH RESPECT TO THE SCOPE OF THE BOARD'S RECONSIDERATION RULE.

A. The Proceedings Before the National Labor Relations Board Which Should Have Led to the Invocation of the Reconsideration Rule

On August 26, 1974, just after the effective date of the health care amendments, Local 250 filed two separate representation petitions with Region 20 of the National Labor Relations Board seeking certification as bargaining representative of separate units of service-and-maintenance employees and registered nurses at Mercy Hospital's location in Sacramento, California. At the same time, Local 250 filed petitions for units of clerical employees and service-and-maintenance employees at the hospital's location in Carmichael, California, approximately 15 miles distant. Thereafter, on September 16, 1974, a hearing was held to consider the appropriateness of the units and at the hearing, three other labor organizations intervened in the proceedings. 29 C.F.R. § 102.63(b).

During the course of the hearing, the main dispute between the various parties concerned the scope of the proposed bargaining unit. The hospital argued that any unit should include employees working at both locations, Sacramento and Carmichael. To the contrary, the unions contended that separate bargaining units should be established for the two locations. Notwithstanding this dispute, the parties did agree to the inclusion of certain classifications

of employees within the service-and-maintenance unit and certain classification of employees within the clerical unit. Broadly speaking the service-and-maintenance unit included all employees working with patients including housekeeping technicians, food service workers, nurse assistants, laundry workers, and vocational nurses. The clerical unit included all clerical type employees including those clerical type employees who worked within the patient care areas.

Following the hearing, the regional director issued his decision and direction of election on December 10, 1974 finding that the proper scope of units would be both locations combined, and otherwise approving the stipulated units of clerical and service-and-maintenance employees.

The unions were dissatisfied with this decision and filed a Request for Review of the regional director's decision with the National Labor Relations Board, primarily asserting their disagreement with the determination of the scope of the units to include both facilities. 29 C.F.R. § 102.67.[2] In response to the Request for Review, the Board notified the parties that this representation case was consolidated for oral argument with a number of other cases involving the scope of the units in the health care industry. These cases were to be "lead cases" deciding the appropriate units in health care facilities, which had just come within the purview of the Board. That oral argument was held on January 27, 1975 with counsel from various health care facilities and various unions throughout the country presenting their positions. On May 5, 1975, the Board issued its decision on review of this case along with decisions in several other

[2]Shortly thereafter, Locals 250 and 39 filed a request to act as a joint petitioner for the service-and-maintenance unit. This request was subsequently granted by the National Labor Relations Board.

cases.[3] In that decision, the Board *modified* the stipulated units on the ground that any clerical unit should include only business office clericals, and that the clerical employees who worked in patient care areas should be included in the service-and-maintenance unit. App. pp. 17-18. The effect of this decision was to alter the composition of the units stipulated to be appropriate by the parties and to shift approximately 30 employees from the clerical unit to the service-and-maintenance unit. This affected approximately 5% of the employees who eventually voted in the election.[4]

Between the date upon which the Board issued its Decision on Review, and the election which was June 4, 1975, the Mercy Hospital raised no objection to the alteration of the units, nor did it file a request for reconsideration with the Board. 29 C.F.R. § 102.65(e)(1). The employees, the union, the National Labor Relations Board, and as far as the record shows, the hospital, were satisfied with the slight alteration in the units, and the election was therefore conducted in an altered unit.

Joint Petitioners won the election, 359 to 332 with six challenged ballots. Pursuant to the Board's rules, the hospital filed objections to the election, although it did not claim that the election had been improperly conducted because of the alteration of the units. 29 C.F.R. § 102.69(a).

[3]Those cases include *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765; *Barnert Memorial Hospital Center*, 217 NLRB 775; *St. Catherine's Hospital of Dominican Sisters of Kenosha*, 217 NLRB 787; *Newington Children's Hospital*, 217 NLRB 793; *Sisters of Joseph of Peace*, 217 NLRB 797; *Duke University*, 217 NLRB 799; *Mount Airy Foundation*, 217 NLRB 803; and *Shriners Hospitals for Crippled Children*, 217 NLRB 806.

[4]Local 250 withdrew its petition for representation of the business office unit, participating only in the election in the service and maintenance unit.

Those objections were investigated, and on August 19, 1975, the Regional Director issued a Supplemental Decision and Certification of Representative overruling the objections in their entirety and certifying the joint petitioners as the bargaining representative for the service-and-maintenance unit. After the Board denied the employer's request for review, Local 250 requested that the hospital bargain. It was at this time that the hospital formally raised the objection that it refused to bargain because the Board "took the medical records personnel and clerks I, II and III who worked in areas other than the business office in the service-and-maintenance unit". This was the first notification to the parties that the hospital took exception to the alteration of the bargaining units. In response the union filed an unfair labor practice charge alleging violations of Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and ( ). After an unfair labor practice complaint was issued, the General Counsel moved for summary judgment and the Board subsequently issued an order transferring the proceedings to itself. On June 7, 1976 the Board issued its Decision and Order, granting the motion for summary judgment and finding that the hospital's refusal to bargain was a violation of Sections 8(a)(1) and (5) of the Act. See App. B. The Board in its decision specifically rejected the employer's contention that its previous alteration of the bargaining units was improper. App. p. .....

Thereafter, the employer refused to comply with the Board's order, and a petition for enforcement was filed in the Court of Appeals for the Ninth Circuit. 29 U.S.C. § 160(e).

In its decision, the Ninth Circuit found that the Board improperly set aside the stipulated unit on the ground that this violated the Board's prior practice with respect to the acceptance of stipulated units. App. p. 6.

The Board, and intervenor Local 250, contended that the Board's rules providing for reconsideration were not invoked by the hospital, and therefore the question of the propriety of setting aside the stipulated unit was not properly before the court. See 29 U.S.C. § 160(e) and 29 C.F.R. § 102.65(e)(1) which permits a party "because of extraordinary circumstances [to] move after the close of the hearing for reopening of the record or move after the decision for reconsideration or rehearing . . .". The Ninth Circuit rejected the utilization of the reconsideration rule on the following ground:

> "The Board further contends that, even if its actions were arbitrary, Mercy should have asked for reconsideration of the bargaining unit determination before the election, and its failure to do so precludes this court from considering the matter. We agree that it might have been preferable if Mercy had moved for reconsideration, but the failure to do so is not fatal. The regulations 29 C.F.R. §§ 102.45(d)(1) and 102.65(e)(1) speak in discretionary not mandatory terms. Further, 29 C.F.R. § 102.48(d)(3) and 102.65 (e)(3) state that such motions are not required in order to exhaust administrative remedies. Certain representations were made during the oral argument which lead us to believe that, under the peculiar circumstances of this case, making a motion for reconsideration would have been a futile act." (App. pp. 8-9)

The Court of Appeals denied a petition for rehearing and a suggestion of hearing *in banc*. It is apparent from

this history of the litigation that the hospital's failure to invoke the reconsideration rule gave it the better of either choice. If it won the election in June of 1975 it would not protest the setting aside of the stipulated units; if it lost the election it had a procedural argument which has successfully tied up the question of representation of the hospital employees for well over three years.

B. The Court's Decision Creates Confusion Over When It Is Necessary To Invoke The Reconsideration Principle.

Between the period May 5, 1975 and June 6, 1975 when the election was conducted, the employer failed to make known its objection to the modification of the stipulated units. The question presented was originally settled in *International Ladies' Garment Workers Union v. Quality Manufacturing Co.*, 420 U.S. 276, 281 n. 3 (1975):

> "We do not address respondent's objection that it was denied procedural due process because the Board based its order on a theory of liability under Section 8(a)(1) allegedly not charged or litigated before the Board . . . but respondent failed to file a petition for reconsideration as permitted by Board Rules and Regulations, § 102.48(d)(1), 29 C.F.R. §102.48(d)(1) that provides that any material error in the Board's decision may be asserted through a motion for reconsideration, rehearing, or reopening of the record. Respondent, therefore, cannot assert its objection on appeal, 'unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances'. 29 U.S.C. § 160(e). Respondent did not suggest any

> 'extraordinary circumstances' . . . . The objection, therefore, may not be considered." [citations omitted][5]

Subsequent to this Court's decision, courts of appeals have reaffirmed this principle. In *N.L.R.B. v. Allied Products Corp.*, 548 F.2d 644, 654 (6th Cir. 1977) the court stated:

> "The Company argues that the Board has adopted *sua sponte* a remedy contrary to Supreme Court holdings, contrary to statutory provision, and indeed, contrary to the Board's own regulations. If that is true, then the fact that the Board acted *sua sponte*, prevented the company from presenting its arguments against the remedy to the Board before the Board acted. This is exactly the kind of extraordinary circumstances for which the option to provide for rehearing or reconsideration is provided."[6]

Confusion has, however, been created by a recent ruling of the Fourth Circuit, and by the lower court's ruling in this case. In *NLRB v. Annapolis Emergency Hospital Association*, 561 F.2d 524, 526 (4th Cir. 1977) the court rejected the principle that section 160(e) is a bar to a consideration of the merits of the issue among other reasons because "Board's error was a purely legal one, so basic in its nature that section 10(e) has no application." *Id.* at 526.

The decision of the court below excuses reconsideration because of comments made by counsel for the Board during the course of oral argument. App., p. 9. This Court has

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[5] 29 C.F.R. §102.48(d)(1) is the reconsideration rule applicable to unfair labor practice proceedings. It is a parallel rule to that applicable to representation proceedings and the issue presented by the Petition equally affects both rules.

[6] See also *NLRB v. A.J. Tower*, 329 U.S. 324(?), 330-331 (1946); *NLRB v. Decatur Transfer & Storage, Inc.*, 430 F.2d 763, 764 (5th Cir. 1970); *International Telephone & Telegraph Corp. v. NLRB*, 294 F.2d 393, 394-95 (9th Cir. 1961) and *NLRB v. Maine Sugar Industries*, 425 F.2d 942, 945 (1st Cir. 1970).

consistently rejected the proposition that Board counsel may speak for the Board itself, when the issue has not been presented to the Board for its own decision and rationale. See *NLRB v. Food Store Employees,* 417 U.S. 1, 9 (1974) and *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers,* 425 U.S. 800 (1976).

More detrimental, however, to the administrative process, is the court's conclusion that the reconsideration rule is not mandatory. This creates a substantial conflict within the circuits and now excuses an employer (or union) from requesting reconsideration of a decision, when the Board has not been presented with the parties' contentions as to whether the Board's action is improper.

The salutory nature of the reconsideration rule is readily apparent. Had the employer protested the modification of the bargaining unit after the May 5, 1975 decision, the Board would have been at least put on notice and given an opportunity to correct the situation.[7] By doing nothing, the hospital misled all parties and deprived the Board of an opportunity to correct this situation prior to the election in June of 1975.

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."
>
> *United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 37 (1952).

[7]The union might well have joined in the employer's protest simply to settle this issue so that an immediate election would not be clouded by this procedural position.

VII
CONCLUSION

The administrative process requires that an administrative agency be presented with the reasons why a party objects to an administrative action. It moreover requires that parties to the administrative proceedings place the administrative agency on notice of their position, prior to court review. The decision of the court below substantially undermines this principle and virtually eliminates the reconsideration principle established by Board regulation. Moreover, it is in conflict with other courts of appeal, and substantially confuses the question of when reconsideration is necessary.

For these reasons, this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
November 16, 1978.

Respectfully submitted,

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(Appendices follow)

Appendices

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

No. 76-3579

National Labor Relations Board,
Petitioner,

vs.

Mercy Hospitals of Sacramento, Inc.,
Respondent.

[Filed June 12, 1978]

Application for Enforcement of an Order of
the National Labor Relations Board

OPINION

Before: SNEED and TANG, Circuit Judges, and
ORRICK.* District Judge

TANG, Circuit Judge:

The National Labor Relations Board (Board) seeks enforcement of its order, published at 224 N.L.R.B. 419, ordering Mercy Hospitals of Sacramento, Inc. (Mercy) to bargain collectively on request with Local 250, Hospital and Institutional Workers Union, SEIU, AFL-CIO (Union), to cease and desist from interfering with its employees in the exercise of their statutory rights, and to post notices. This court has jurisdiction pursuant to § 10(e) of

*Honorable William H. Orrick, United States District Judge for the Northern District of California, sitting by designation.

the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq.

I.

On August 26, 1974, the Act was amended to cover persons employed at health care institutions, including nonprofit hospitals, Pub. L. 93-360, 88 Stat. 395 (1974). On that same day, the Union filed with the Board four petitions for representation elections, seeking certification as the bargaining representative for two separate employee units at each of Mercy's two locations. Representation hearings were held to determine the appropriate bargaining units. Three other labor organizations intervened in those hearings.

The parties stipulated to a service-and-maintenance unit and an all-clerical unit and to the classifications of employees in each of these units. The parties disagreed as to whether there should be separate units at each geographical location or an employer-wide set of units. After the hearings, the Regional Director issued a decision and direction of elections on December 10, 1974, finding that the proper geographical scope was employer-wide, and accepting the stipulation as to the composition of the units. The Union filed a request for review.

The Union and one of the intervenors, Local 39, International Union of Operating Engineers, AFL-CIO (Local 39), then requested that they be allowed to appear on the ballot as joint petitioner and offered to withdraw the request for review of the unit determination if the joint petitioner request were granted. Mercy opposed the request for joint petitioner as improper and untimely.

The Board scheduled argument in this and five other related cases for January 27, 1975. The notice of hearing[1] stated that the Board was interested in hearing argument on appropriate units in the health industry, especially the appropriate units for clerical personnel. After hearing argument, the Board granted the Union's request for review, and stayed the election pending its decision.

On May 5, 1975, the Board issued its decision and rejected the all-clerical unit the parties had stipulated to. The Board was of the opinion that business office clericals should be in a bargaining unit separate from other clerical employees. The request of the Union and Local 39 to appear as joint petitioners was granted. The Union then withdrew its petition for election in the business office clerical unit.

On June 4, 1975, a representation election was held in the service-and-maintenance unit, which the Union won, 359 to 332 with six challenged ballots. Mercy filed objections, claiming that the Union had made misrepresentations which influenced the election, and that the Board had improperly granted the request of the Union and Local 39 to appear as joint petitioner. The Regional Director overruled the objections and certified the election results. Mercy requested Board review, which was denied October 23, 1975.

On October 28, 1975, the Union requested that Mercy bargain. Mercy refused. On December 10, 1975, the General

[1]The Notice of Hearing stated, in pertinent part:
The Board is primarily interested in argument as to what unit or units would be appropriate in these cases involving the health care industry. In addition, the Board solicits views as to what unit or units should embrace the following classifications among others: (a) business office clericals; (b) other clericals, e.g., receptionists, switchboard and paging operators, admitting clerks, ward clerks, medical record clerks, laboratory clerks.

Counsel issued a complaint, charging that Mercy's refusal to bargain violated § 8(a)(1) and (5) of the Act, 29 USC § 158(a)(1) and (5). Mercy admitted its refusal to bargain but claimed that the Board's certification of the bargaining units was invalid because the unit stipulation had been rejected and because of the Union's pre-election conduct (the same conduct which had been challenged in the representation proceeding).

The Board issued its decision, published at 224 N.L.R.B. 419, on June 7, 1976. The Board found that all issues raised by Mercy were or could have been litigated in the underlying representation proceeding and that Mercy was in violation of the Act. The Board ordered Mercy to bargain with the Union on request, to cease and desist from interfering with the employees' § 7 rights, and to post notices. The General Counsel has brought the present action for enforcement.

II.

There are two basic issues presented by this case: whether the Board's certification of the bargaining units was invalid because of the manner in which the Board dealt with the stipulation, and if not, whether the Board erred in refusing to overturn the election because of the Union's conduct.

A.

It is well-settled that the Board has a large measure of discretion in determining appropriate bargaining units. *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947); *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146 (1941); *Atlas Hotels, Inc. v. N.L.R.B.*, 519 F.2d 1330 (9th Cir. 1975). The Board is not required to choose the most appropriate unit, only to choose a unit within the range of appropriate units, *Atlas Hotels, supra; N.L.R.B. v. Lerner Stores Corp.*, 506 F.2d 706 (9th Cir. 1974). The Board's decision in these matters will not be overturned unless there is an abuse of discretion, the Board acted in an arbitrary, unreasonable, or capricious fashion, or the unit is in violation of statute. *Packard Motor Car Co., supra; Atlas Hotels, supra; Lerner Stores, supra; Libbey-Owens-Ford Co. v. N.L.R.B.*, 495 F.2d 1195 (3rd Cir. 1974) *cert. denied* 419 U.S. 998; *N.L.R.B. v. Wolverine World Wide Inc.*, 477 F.2d 969 (6th Cir. 1973).

However, when the parties stipulate to a bargaining unit, the Board's powers are circumscribed. The Board is bound by the stipulation unless the stipulation violates applicable statutes or settled Board policy. *N.L.R.B. v. Detective Intelligence Service Inc.*, 448 F.2d 1022 (9th Cir. 1971); *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir. 1967); *Tidewater Oil Co. v. N.L.R.B.*, 358 F.2d 363 (2nd Cir. 1966). In those cases where the stipulation is ambiguous, the Board may interpret the stipulation, but the interpretation must be based on the intent of the parties. *Detective Intelligence Service Inc., supra; Tennessee Packers, Inc., supra.* The Board itself acknowledges that such stipulations are to be honored provided that they are approved by the Regional Director and they do not violate express statutory provisions or established Board policies. *The Tribune Co.*, 190 N.L.R.B. 398 (1971).

The Board contends that the practice of honoring stipulations is inapplicable in the circumstances presented here. First, the Board claims that when this case was decided the Board had not yet determined whether stipulations in the

health care field would be given the same weight as stipulations in other areas. Second, the Board argues that even if stipulations in the health care field would be honored if they met the *Tribune Co.* standards, it was impossible for this stipulation to meet those standards because the Board had not yet formulated its policy on bargaining unit determinations. Finally, the Board appears to claim that acceptance of this stipulation would lead to an undue proliferation of bargaining units.

We find these arguments unpersuasive. We fail to see why the policy of accepting stipulations that meet the conditions set forth in the *Tribune Co.* should not apply to areas newly added to the Board's jurisdiction. The Board might decide to change the policy of accepting stipulations, or it might decide that the policy should not apply in the health care field. But either of these decisions would be a departure from the Board's conclusions in previous cases, and the Board is therefore obliged to set forth its reasoning in favor of the change in order to avoid the appearance of arbitrariness, *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 (1965). The Board has not done so, and we note that in a case subsequent to this one the Board has stated that it will accept such stipulations in the health care field, *Otis Hospital Inc.*, 219 N.L.R.B. 164 (1975).

The Board's second argument, that a stipulation could not meet the *Tribune Co.* standards until the Board had formulated its policy, is more troublesome. At first glance it would seem that it could not be determined if a stipulation violated Board policy until Board policy had been determined. However, this difficulty is more apparent than real, since "Board policy" is being used in two distinct senses.

As we read the Board's decision in this case, the Board was applying the community interest doctrine to the hospital situation. The community of interest doctrine is the Board's method for determining appropriate bargaining units; it consists of examining and comparing a number of factors (e.g. similarity of work performed, similarity of scale of earnings and other benefits, similarity of qualifications and skills, etc.) so that employees may be grouped in bargaining units with other employees who have a community of interests and not grouped with employees without such a community of interests. *See N.L.R.B. v. Saint Francis College*, 562 F.2d 246, 249 (3rd Cir. 1977). The use of this doctrine is entirely proper in those cases where the appropriate bargaining unit is disputed. But the community of interest doctrine is insufficient to override the intent of the parties in making a stipulation; it is not one of the settled Board policies which justify a refusal to accept a stipulation. *Detective Intelligence Services, Inc., supra; Tennessee Packers, Inc., supra; Tidewater Oil Co., supra.* Therefore, the Board's refusal to accept the stipulation here was arbitrary.

The Board is charged with the statutory duty of assuring employees the "fullest freedom in exercising the rights guaranteed by this Act" § 9(b); 29 USC § 159(b). It is possible that this stipulation would hinder the employees in the exercise of those rights, or would violate some other settled Board policy. As the Board notes, the legislative history of the health care amendments shows a special Congressional concern with the undue proliferation of bargaining units in the health care field. *See Memorial Hospital of Roxborough v. N.L.R.B.*, 545 F.2d 351, 361 (3rd Cir. 1976).

The Board argues here that to accept this stipulation would effect such an undue proliferation. Were this to be so, the Board would be justified in rejecting the stipulation. However, we fail to see how accepting this stipulation would have that result. Both the stipulation and the Board's order set forth the same number of bargaining units. The difference between the Board's order and the stipulation was whether certain employees were allocated to one unit or another; not the creation of additional units.

There may be Board policies other than community of interest which would be violated by accepting this stipulation. The case is therefore remanded to the Board to reconsider this stipulation in light of Board policies other than the community of interest doctrine. Our function is not to determine the bargaining unit, merely to make plain what we see as the Board's error, *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers,* 425 U.S. 800 (1976).

The Board further contends that, even if its action were arbitrary, Mercy should have asked for reconsideration of the bargaining unit determination before the election, and its failure to do so precludes this court from considering the matter. We agree that it might have been preferable if Mercy had moved for reconsideration, but the failure to do so is not fatal. The regulations, 29 C.F.R. §§ 102.48(d)(1) and 102.65(e)(1)[2] speak in discretionary, not mandatory terms. Further, 29 C.F.R. §§ 102.48(d)(3) and 102.65(e)(3) state that such motions are not required in order to exhaust

[2]29 C.F.R. §102.48(d)(1) states in pertinent part:
A party to a proceeding before the Board *may*, because of extraordinary circumstances, move for reconsideration, rehearing, or

administrative remedies. Certain representations were made during the oral argument which lead us to believe that, under the peculiar circumstances of this case, making a motion for reconsideration would have been a futile act.

B.

Given the view we have taken, it is unnecessary to discuss other possible errors in the Board's finding that the Union's conduct did not prevent a fair election.

Petition to enforce is denied and remanded.[3]

reopening of the record after the Board decision or order. (emphasis added).
29 C.F.R. §102.65(e)(1) states in pertinent part:
A party to a proceeding *may*, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision for reconsideration or rehearing, except that no motion for reconsideration or rehearing will be entertained pursuant to this paragraph by the regional director with respect to any matter which can be raised before the Board pursuant to any other section of the rules in this part, or by the Board with respect to any matter which could have been raised but was not raised before it pursuant to any other section of the rules of this part. (emphasis added).

[3]As amended by order filed July 3, 1978.

Appendix B

Mercy Hospitals of Sacramento, Inc. and Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO. Case 20-(224 NLRB 419)

June 7, 1976

DECISION AND ORDER

By Chairman Murphy and Members Jenkins and Penello

Upon a charge filed on November 19, 1975, by Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Mercy Hospitals of Sacramento, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 20, issued a complaint on December 10, 1975, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on or about August 19, 1975, following a Board election in Cases 20-RC-12299, 12300, 12301, and 12302, the Union and Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO, herein called Local 39, as Joint Petitioner (herein referred to collectively as Joint Petitioner), was duly certified as the exclusive collective-bargaining repre-

sentative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about November 14, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Joint Petitioner as the exclusive bargaining representative, although the Joint Petitioner has requested and is requesting it to do so. On December 16, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 11, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 26, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause entitled "Opposition to Motion for Summary Judgment." On March 5, 1976, the Union as Charging Party and Local 39, as the other jointly certified collective-bargaining representative, filed a joinder in motion for summary judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor

[1]Official notice is taken of the record in the representation proceeding. Case 20-RC-12299, et al., as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, the Respondent admits all the operative factual allegations of the complaint but denies the conclusionary averments on the basis of the alleged inappropriateness of the unit found appropriate in the underlying representation proceeding and in its objections to the election and the Board's resolution thereof. On the other hand, the General Counsel contends that the Respondent has raised no issues of law or fact requiring a hearing. We agree with the General Counsel.

Review of the entire record herein, including that in Cases 20–RC–12299, 12300, 12301, and 12302, discloses that a hearing on the representation petitions filed was held, in which Local 39 and two other associations participated as intervenors.[2] Thereafter, the Regional Director, on December 10, 1975, issued a Decision and Direction of Elections in which he found appropriate, *inter alia*, a bargaining unit of all service and maintenance employees and a unit of all office clerical employees, the composition of which the parties stipulated. All parties, except the Respondent, filed with the Board requests for review contending, *inter alia*, that the unit issues raised substantial questions for law

[2]California Association of Medical Technology, Engineers, and Scientists of California, MEBA, AFL-CIO, and California Nurses Association.

and policy and that there were compelling reasons for the establishment of Board rules and policies in this area. The Respondent filed a brief in opposition. Because of the important issues raised by this and a number of other cases in the health care industry, the Board, on January 29, 1976, held oral argument and received briefs *amici curiae* on the general question of the composition of appropriate bargaining units in the health care industry. On February 5, 1975, the Board granted the request for review and stayed the elections pending review.

After considering the entire record, including the oral arguments and *amici* briefs, in these cases, the Board, on May 5, 1975, with Member Fanning concurring, and former Member Kennedy dissenting, in part, issued its Decision on Review and Direction of Elections (217 NLRB 765 (1975)), herein called Decision on Review, in which, *inter alia,* it found appropriate a unit of all service and maintenance employees and, over the opposition of the Respondent, granted the request of the Union and Local 39 to be on the ballot as a joint petitioner in that unit election; further, it agreed with the Regional Director's determination as to the appropriateness of the office clerical unit, but disagreed with his findings as to the composition of that unit because it decided that in the health care field as in the industrial sphere, it would continue to recognize the distinction between business office clerical employees and other types of clerical employees. Accordingly and consistent with the congressional direction against the proliferation of bargaining units in the health care industry, it found appropriate a unit of all business office clerical employees excluding the other types of clerical employees,

herein called hospital clericals, who because their interests were more closely related to the functions served by the employees in the service and maintenance unit, were included in that unit sought by the Union and Local 39 as Joint Petitioner.

In the June 14, 1975, election in the service and maintenance unit found appropriate by the Board[3] the Union and Local 39 as Joint Petitioner won. The Respondent filed timely objections to the election alleging, in substance, that (1) the Board failed to follow its own rules in granting the request of the Union and Local 39 to appear on the ballot as Joint Petitioner; (2) the Union distributed election propaganda which suggested Board support for the Union and which misrepresented facts concerning (a) layoff and subcontracting, (b) wage rates under the Union's contract with another hospital, and (c) the Respondent's role during the malpractice crisis in the hospital industry which resulted in strikes, layoffs, and shortened workweeks. After investigation, the Acting Regional Director, on August 19, 1975, issued a Supplemental Decision and Certification of Representative in which she overruled the Respondent's objections in their entirety and certified the Union and Local 39, Joint Petitioner, as the exclusive bargaining representative of the employees in the service and maintenance unit found appropriate by the Board. Thereafter, the Respondent filed a timley request for review in which it reiterated its objections and sought to have the election set aside. On October 23, 1975,

[3]Elections in the registered nurse and business office clerical units found appropriate by the Board were not held because the Regional Director had approved the Union's request to withdraw its petitions in Cases 20-RC-12300 and 20-RC-12302.

the Board denied the request as raising no substantial issues warranting review.

In its response to the Notice To Show Cause, the Respondent also contends the Board violated due process and its own rules by failing to honor the stipulated unit approved by the Regional Director and by excluding the hospital clericals from the stipulated clerical unit and including them in the service and maintenance unit without the Respondent being afforded the opportunity to present evidence and litigate the unit placement of the clerical employees. The Respondent also argues that the Board's subsequent decision in *Otis Hospital Inc.*, 219 NLRB 164 (1975), in which the Board decided to apply its general stipulation policy to the health care industry, supports its position as to the stipulated clerical unit.

First, we note that the Respondent could have raised and litigated these issues in the underlying representation case but failed to do so until after the instant unfair labor practice proceeding was instituted. Further, as set forth in footnote 26 of the Decision on Review in the underlying representation case, the Board stated that "no party could at that time, with any degree of certainty, know what unit or units in this newly covered industry would be found appropriate" and that the "unit determinations [of the Regional Director] were tentative." It was for this basic reason that the Board had requested oral argument in a series of landmark health care cases, in order to enable the parties, including *amicus curiae*, to assist it in making initial unit determinations particularly for hospitals in the newly covered industry. Thus, at the oral argument, the Union counsel, adverting to the general distinction between plant and clerical employees arising from a difference in community of interest, suggested that the health care industry be treated the same as the other industries; while the Respondent counsel pointed out that the clerical unit stipulated by Respondent with the Union "evolves solely from the unique facts which are in existence at the Mercy Hospitals . . . ." and does not have "persuasive weight on the clerical issues which are present before the Board in other cases." In these circumstances, further litigation of the particular facts in *Mercy Hospitals* would not have been of any great significance to the Board in establishing appropriate clerical units for hospitals in the newly covered health care industry. Further, as we noted in the subsequent *Otis* decision where it it was determined for the first time to give effect to unit composition stipulations in the health care industry, the cases, in which oral argument was held, "left open the question of the effectiveness of stipulations designating units not in conformity with the determinations made in contested cases."

Therefore, giving the governing weight normally afforded to stipulations in other industries was not warranted with respect to the clerical unit stipulated in the underlying representation case. Accordingly, we find that the Respondent's reliance upon the subsequent *Otis* decision to be not only inapposite but also without merit. Further, upon the records and oral arguments in the above cases, and consistent with the congressional intent, the Board decided, in the health care field as in the industrial sphere, to continue to recognize the distinction between business office clerical employees and other types of cler-

ical employees and, following this determination, excluded from the business office clerical unit found appropriate herein all other clerical employees who were then included in the service and maintenance unit sought by the Union and Local 39 as Joint Petitioner.[4]

It thus appears that except for the *Otis* stipulation argument, which we have found to be inapposite and without merit, the additional contentions raised by the Respondent are without merit and are matters which could have been raised and litigated in the underlying representation case.[5]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

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[4]In so concluding, the Board specifically overruled the decision in *National Medical Hospitals, Inc. of San Diego, d/b/a Chico Community Memorial Hospital*, 215 NLRB 821 (1974), to the extent it was inconsistent with the decision herein. In that case, the appropriate unit consisted of all clerical employees.

[5]Further, with respect to subsequent Case 20-RC-13017 where the Union and Respondent stipulated to a unit of hospital clerical and business office clerical employees in the Mercy Hospitals, the Regional Director on October 15, 1975, found that the stipulated all-clerical unit was barred by the Decision on Review herein. The Respondent filed a timely request for review raising essentially the same arguments that had been raised herein and in effect requesting reconsideration of the Decision on Review herein. On November 15, 1975, the Board rejected these arguments in denying the request for review.

[6]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. The Business of the Respondent

Respondent is a California corporation with its principal office and place of business in Sacramento, California, from which it operates three acute care and one geriatric care nonprofit hospital facilities. During the past year it received gross revenues in excess of $500,000 and purchased goods and supplies valued in excess of $100,000 from California suppliers who, in turn, purchased said goods and supplies from sources located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO, and Local 39 are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and maintenance employees, including licensed vocational nurses, graduate vocational nurses, nurse assistants, ward clerks, surgical technicians, ACC clerks, x-ray technicians, cardiopulmonary technicians, respiratory therapy technicians, EKG technicians, tissue technicians, EEG technicians, pharmacy technicians, pharmacy clerks, computer programmers, printing assistants, technicians to receiving clerks, housekeeping technicians, food service workers, laundry workers, department aides, all employees of the maintenance and engineering department, and all clerical employees other than business office clerical employees, employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California; and at Mercy San Juan Hospital, Carmichael, California; excluding all other employees, guards, and supervisors as defined in the Act.

2. The certification

On June 14, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted

under the supervision of the Regional Director for Region 20, designated the Joint Petitioner as their representative for the purpose of collective bargaining with the Respondent. The Joint Petitioner was certified as the collective-bargaining representative of the employees in said unit on August 19, 1975, and the Joint Petitioner continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 28, 1975, and at all times thereafter, the Joint Petitioner has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 14, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Joint Petitioner as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since November 14, 1975, and at all times thereafter, refused to bargain collectively with Joint Petitioner as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Joint Petitioner as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such undertaking in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Joint Petitioner as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964); cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964); enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Mercy Hospitals of Sacramento, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO, and Local 39 are labor organizations within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time service and maintenance employees, including licensed vocational nurses, graduate vocational nurses, nurse assistants, ward clerks, surgical technicians, ACC clerks, x-ray technicians, cardiopulmonary technicians, respiratory therapy technicians, EKG technicians, tissue technicians, EEG technicians, pharmacy technicians, pharmacy clerks, computer programmers, printing assistants, technicians to receiving clerk, housekeeping technicians, food service workers, laundry workers, department aides, all employees of the maintenance and engineering department, and all clerical employees other than business office clerical employees, employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California; excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 19, 1975, the above-named Joint Petitioner has been and now is the certified and exclusive rep-

resentative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 14, 1975, and at all times thereafter, to bargain collectively with the above-named Joint Petitioner as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Mercy Hospitals of Sacramento, Inc., Sacramento, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of em-

ployment with Hospital and Institutional Workers, Local 250, Service Employees International Union, AFL-CIO, and Local 39, Joint Petitioner, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees, including licensed vocational nurses, graduate vocational nurses, nurse assistants, ward clerks, surgical technicians, ACC clerks, x-ray technicians, cardiopulmonary technicians, respiratory therapy technicians, EKG technicians, tissue technicians, EEG technicians, pharmacy technicians, pharmacy clerks, computer programmers, printing assistants, technicians to receiving clerk, housekeeping technicians, food service workers, laundry workers, department aides, all employees of the maintenance and engineering department, and all clerical employees other than business office clerical employees, employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California; excluding all other employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named Joint Petitioner as the exclusive representative of all employees in the aforesaid approriate unit with respect to rates of pay, wages, hours, and other terms and conditions of em-

ployment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities in Sacramento and Carmichael, California, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix C

In the United States Court of Appeals
for the Ninth Circuit

No. 76-3579

National Labor Relations Board,
Petitioner,

vs.

Mercy Hospitals of Sacramento, Inc.
Respondent.

[Filed Aug. 25 1978]

ORDER

Before: SNEED AND TANG, Circuit Judges, and ORRICK, District Judge.

The panel as constituted in the above case has voted to deny both petitions for rehearing. Judges Sneed and Tang have voted to reject the suggestions for a rehearing en banc. Judge Orrick recommended rejection of rehearing en banc.

The full court has been advised of the suggestions for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for a rehearing en banc are rejected.

Appendix D

Mercy Hospitals of Sacramento, Inc.[1] *and* Local 250, Hospital & Institutional Workers Union, Service Employees International Union, AFL-CIO, Petitioner.[2] Cases 20-RC-12299, 20-RC-12300, 20-RC-12301, and 20-RC-12302 [217NLRB765]

May 5, 1975

DECISION ON REVIEW AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before Hearing Officer Earl D. Brand of the National Labor Relations Board. On December 10, 1974, the Regional Director for Region 20 issued a Decision and Direction of Elections in which he found appropriate three separate bargaining units consisting of professional employees, service and maintenance employees, and office clerical employees, respectively. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, requests for review of the Regional Director's Decision and Direction of Elections were filed by the Petitioner jointly with Intervenor Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO (hereinafter re-

[1]The names of the Employer and the Petitioner appear as amended at the hearing.

[2]California Association for Medical Technology, Engineers and Scientists of California, MEBA, AFL-CIO; Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO; and California Nurses Association were granted intervention with respect to various of the petitions, on the basis of sufficient showings of interest.

ferred to as Local 39), by Intervenor California Association for Medical Technology, Engineers and Scientists of California, MEBA, AFL-CIO (hereinafter referred to as CAMLT), and by Intervenor California Nurses' Association (hereinafter referred to as CNA), contending, *inter alia,* that the Regional Director's findings as to the appropriate units raised substantial questions of law and policy and were based on erroneous factual findings and that there are compelling reasons for establishment of Board rules and policies in this area. In their request for review, Petitioner and Local 39 requested oral argument as to the issues raised on review. Thereafter, the Employer filed a brief in opposition to the requests for review.

On January 16, 1975, the Board, having determined that this and a number of other cases in the health care industry presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument in several of the cases, including this one, as well as oral argument on the general question of the composition of appropriate bargaining units in the health care industry.[3] Oral arguments were heard on January 27, 1975. Briefs *amici curiae* were filed by interested parties and have been duly considered by the Board.

By telegraphic order dated February 4, 1975, the Board granted the Petitioner's and the Intervenors' requests for review and stayed the elections pending decision on review.

The Board has considered the entire record in this case, with respect to the issues under review, including the oral arguments and the *amici* briefs, and makes the following findings:

[3]Member Kennedy dissented from the grant of oral argument.

The Employer operates a long-term geriatric care facility, Mercy Convalescent Hospital, located in Sacramento, California, adjacent to its two acute care facilities, Mercy General Hospital and Mercy Children's Hospital. The parties agreed that Mercy Convalescent Hospital and Mercy Children's Hospital should be considered as part of the operations of Mercy General and the three facilities are hereinafter referred to as Mercy General. The Employer also operates a third acute care facility, Mercy San Juan Hospital (hereinafter referred to as Mercy San Juan), at Carmichael, California, approximately 13 miles from Sacramento.

The petitions in the instant case sought a number of separate units of employees at Mercy General and Mercy San Juan. Contrary to the positions of the Petitioner and the Intervenors, however, the Regional Director found, and we agree, that Mercy General and Mercy San Juan constitute a single employer within the meaning of the Act and that the appropriate bargaining units should consist of employees at both facilities.

The record establishes considerable functional and operational integration between Mercy General and Mercy San Juan. Thus, Mercy General and Mercy San Juan constitute a single corporation and a single governing board controls the overall operations of both facilities. Although each facility is separately administered and maintains a separate personnel department employees at both facilities are subject to uniform personnel and labor relations policies, fill out identical job applications and personnel forms, and share common job classifications, wage scales, and benefit programs. In addition, job vacancies are posted in both

facilities and preference is given to current employees who may transfer or be promoted to positions in either facility without loss of seniority.

The record also establishes that Mercy General and Mercy San Juan share such common internal services as laundry, receiving, purchasing, data processing, billing, and accounting. These services are administered through a single Shared Services Department and employees in each of these service departments are commonly supervised and frequently and regularly interchange between facilities as needed. In addition, one bakery and one printshop located at Mercy General serve both facilities.

Although there are some differences in the medical services offered by Mercy General and Mercy San Juan which require somewhat different skills and supervision, the record does establish that Mercy General and Mercy San Juan regularly interchange supplies, equipment, and support personnel in connection with the operation of surgical and inhalation therapy services. Both facilities also utilize the same outside contractors for physician services in the x-ray and nuclear medicine departments and in the emergency rooms.

In view of the above factors which establish functional integration between the operations of Mercy General and Mercy San Juan, common overall administration, common personnel and labor relations policies, common wages, benefits, and job classifications shared by all employees, common supervision in some areas, and substantial employee transfer and integration between facilities, we find that the

appropriate bargaining units should encompass employees at all of the Employer's facilities.[4]

The Appropriate Units

1. Professional employees

a. Registered nurses

The Petitioner petitioned to represent all registered nurses employed at Mercy General. Intervenor CNA sought to represent a single unit of all registered nurses employed at both Mercy General and Mercy San Juan. The Regional Director, in agreement with the Employer's position, found that the appropriate professional bargaining unit must consist of all professional employees, including registered nurses,[5] employed at both of the Employer's facilities. In the circumstances of this case, we reach a different conclusion.

To be sure, the principal thrust of the legislative history of the health care amendments to the Act admonishes the Board to avoid undue proliferation of bargaining units in the health care industry. Thus, the Senate Committee Report states:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee

[4]Although, as noted previously, the petitioned-for units consisted of employees at one or the other of the Employer's facilities, we note that, at the oral argument, counsel for the Petitioner and the Intervenors expressed the view that there was sufficient evidence herein to support the Regional Director's findings concerning the scope of the bargaining units and that, for the purposes of the instant case, they would not seek review of the Regional Director's finding in this respect.

[5]The parties stipulated that registered nurses are professional employees within the meaning of Sec. 2(12) of the Act.

notes with approval the recent Board decisions in *Four Seasons Nursing Center,* 208 NLRB No. 50 . . . (1974), and *Woodland Park Hospital,* 205 NLRB No. 144 . . . (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB 1232 . . . (1973).[1]

[1]By our reference to *Extendicare,* we do not necessarily approve all of the holdings of that decision.[6]

Senator Taft characterized this statement as designed "to stress the necessity to the Board to reduce and limit the number of bargaining units in a health care institution."[7] Senator Taft further directed the Board to expend "every effort . . . to prevent a proliferation of bargaining units in the health care field. . . ."[8] Thus, our consideration of all issues concerning the composition of appropriate bargaining units in the health care industry must necessarily take place against this background of avoidance of undue proliferation, particularly at the commencement of our establishment of units in hospitals, when our experience with this industry and its employment relations is in its infancy.

However, despite this clear statement by the Congress, we are constrained to view the legislative history as not precluding the Board from finding appropriate separate bargaining units for registered nurses when they are sought to be represented on that basis. We note, first, that portions of the legislative history indicate that Congress, in the final analysis, left the matter of the determination of appropriate units to the Board. Congress rejected Senator Taft's

[6]S. Rept. 93-766, 93d Cong. 2d sess. 5 (1974); see also H. Rept. 93-1051, 93d Cong., 2d sess. 7 (1974).

[7]120 Cong. Rec. S. 6940 (1974).

[8]120 Cong. Rec. S. 7311 (1974).

specific suggestion that all professional employees should by law be included in a single bargaining unit.[9] We also view Senator Williams' statement on behalf of the Senate Conferees as indicative of Congress' willingness to allow the Board some latitude in determining the composition of appropriate units in the health care industry based on the weighing of such traditional standards as "interests between employees in different job classifications." Senator Williams stated:

> . . . the National Labor Relations Board has shown good judgment in establishing appropriate units for the purposes of collective bargaining, particularly in wrestling with units in newly covered industries. While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, *sometimes circumstances require that there be a number of bargaining units among nonsupervisory units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications.*
>
> While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, *it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units. (NLRB v. Delaware-New Jersey Ferry Co.,* 128 F.2d 130 (3d Cir. 1942)). [Emphasis supplied.][10]

[9]Senator Taft's bill (S. 2292, 93d Cong., 1st sess. (1973)) provided for no more than four appropriate bargaining units in the health care industry (1) all professional employees (2) all technical employees, (3) all clerical employees; and (4) all service and maintenance employees.

[10]120 Cong. Rec. S. 12104 (1974).

Upon careful consideration of all of the arguments made before us in this and other cases on which we heard oral argument, as well as the positions of the *amici* who participated in this and the related proceedings, we have concluded that registered nurses posses, among themselves, interests evidencing a greater degree of separateness than those possessed by most other professional employees in the health care industry. These distinct interests derive not only from the peculiar role and responsibilities of registered nurses in the health care industry, but also from an impressive history of exclusive representation and collective bargaining.

The primary and indeed overriding responsibility of registered nurses is to maintain the best possible patient care. Pursuant to this responsibility, registered nurses, unlike most other professional employees, are required to be on duty 24 hours a day, 7 days a week, 365 days a year. Their duties and responsibilities with respect to patient care cannot by law and licensure be delegated to any other employees, including other professionals, and must therefore be performed exclusively by registered nurses. Apparently in recognition of this unique degree of professional responsibility, the Joint Committee on Accreditation of Hospitals, as well as the laws of several States, requires all member hospitals to maintain a separately administered department of nursing, under the direction of a director of nursing, for the purpose of establishing and administering all departmental regulations and qualifications. Thus, complete authority over registered nurses in hospitals is centralized in the director of nursing and all hiring, firing, and regulating of working conditions, such as hours, shifts, and

job descriptions, take place within the confines of the department of nursing.

We also note that all registered nurses, in addition to graduating from accredited nursing schools, are required, as a precondition of employment, to take and pass uniform national licensing examinations and to acquire and maintain state licenses to practice.

Perhaps of the greatest significance in establishing the separate interests of registered nurses is their singular history of separate representation and collective bargaining often as the result of voluntary recognition. The parties and *amicus* participants have called the Board's attention to numerous collective-bargaining agreements which have been negotiated in behalf of registered nurses by organizations which possess specialized knowledge and expertise in the areas of significance to registered nurses. The Board itself has, in the past, recognized the separate interests of registered nurses and has routinely established separate nurse units for collective-bargaining purposes.[11] In *Consolidated Vultee Aircraft Corporation,* for example, 108 NLRB at 592, it was noted that:

> The Board has consistently recognized that nurses constitute a well-defined professional group whose training, skill, and duties differ from those of other employees, and that a unit confined to nurses is appropriate for the purposes of collective bargaining.

[11]See, e.g., *Hudson Motor Car Company,* 45 NLRB 55 (1942); *Consolidated Vultee Aircraft Corporation,* 56 NLRB 1785 (1944), 59 NLRB 1276 (1944), 108 NLRB 591 (1954); *American Steel & Wire Company,* 58 NLRB 253 (1944); *Consolidated Steel Corporation,* 61 NLRB 97 (1945); *Standard Oil Company (Indiana),* 80 NLRB 1022 (1948); *Diversified Health Services, Inc. d/b/a Convalescent Center of Honolulu,* 180 NLRB 461 (1969). Accord: *Doctors' Hospital of Modesto, Inc.,* 193 NLRB 833 (1971), enfd. 489 F.2d 772 (C.A. 9, 1973).

We are unable to ignore this tradition of separate and exclusive representation and collective bargaining. Separate bargaining for other health care professionals, to the extent it has been shown to exist, appears to have been on a scale of considerably smaller proportions.

Therefore, mindful of the congressional directions concerning the number of appropriate bargaining units in the health care industry, and based on the above factors which compellingly establish the singularity of the interests of registered nurses, we are moved to accord continued recognition to those separate interests. Accordingly, for the aforementioned reasons, we find that registered nurses, if they are so sought and they so desire, are entitled to be represented for the purposes of collective bargaining in a separate bargaining unit.[12]

At the time of the hearing, the Employer employed seven nurse permittees. Nurse permittees are nurses who have graduated from accredited nursing schools and have either taken or are about to take the registration examination required by the State to become licensed as registered nurses. Until such time as they receive notification that

[12]The Board has previously recognized that certain other specially skilled professional employees may constitute a separate appropriate bargaining unit from other professional employees based on a history of separate professional organization and separate administration. Thus, in *University of San Francisco,* 207 NLRB 12 (1973), the Board directed a separate election among law school faculty, despite the fact that all university faculty were professional employees, because of the unique "accreditation and professional standards established by the American Bar Association and the Association of American Law Schools, as well as by various state judiciaries" and because the law school operated under separate administration from other university faculty groups. See also *Fordham University,* 193 NLRB 134 (1971); *The Catholic University of America,* 205 NLRB 130 (1973).

they have passed the examination, the nurse permittees work under state permits performing essentially the same functions and duties as the registered nurses, under supervision of a registered nurse, except for the handling of narcotics. The average length of time before a nurse permittee becomes a registered nurse is less than 3 months. In agreement with the Regional Director, we find that nurse permittees, by virtue of the nature of their training and working conditions, are professional employees within the meaning of the Act, and we shall include them in the nurses' unit.[13]

The Employer also employed at the time of the hearing 16 charge nurses. However, the record does not clearly establish the extent of any supervisory powers they may possess. The record reveals that charge nurses may be responsible for directing a work force which varies in size from two to eight nursing employees, including registered nurses, licensed vocational nurses, and nurses assistants. While the record establishes that charge nurses make up work schedules and schedule vacations and time off, the charge nurses, unlike head nurses whom the Regional Director found to be supervisors,[14] do not have authority to resolve scheduling conflicts. Further, unlike the head

[13]Local 250 contested the professional status of nurse permittees at the hearing, but did not expressly raise the issue in its request for review.

[14]In the absence of any request for review of the Regional Director's findings with respect to head nurses, we find, in agreement with the Regional Director, that head nurses are supervisors within the meaning of the Act. We note that the parties stipulated that the director of nursing, the assistant director of nursing, nursing unit supervisor, and RN supervisors are also supervisors within the meaning of the Act and are excluded from the unit of professional employees.

nurses, it is not clear whether the charge nurses' responsibility extends beyond the immediate shifts on which they work, whether they can effectively recommend hiring of employees, or whether the employee evaluations prepared by them are used in determining eligibility for salary increases. Therefore, as we are unable, on the record before us, to determine the supervisory status of charge nurses, we shall, as did the Regional Director, permit them to vote subject to challenge.

There are approximately 27 registered nurses employed by the Employer who do not work in the Department of Nursing. Instead, they are permanently assigned to other departments in the hospital including laboratory, radiology, business office, educational training, cardiopulmonary, internal medicine, and intravenous therapy. Unlike the registered nurses working in the Department of Nursing who report to the director of nursing, these 27 registered nurses report to and are supervised by supervisors in the respective departments in which they work. The record reveals that, in some instances, they perform the same work under the same conditions as other employees in their respective departments and in some instances their work is of a more specialized nature. We find that the record evidence is insufficient upon which to base a clear determination that these 27 registered nurses share a community of interest with registered nurses in the Department of Nursing and we shall therefore allow them to vote subject to challenge.

Accordingly, for the aforementioned reasons, we find that a unit consisting of all registered nurses and nurse permittees in the Department of Nursing is appropriate

for the purposes of collective bargaining and we shall direct an election therein.

b. Other professional employees[15]

As stated previously, any consideration of issues concerning the composition of appropriate bargaining units in the health care industry must take into account the expression in the legislative history that the Board avoid undue proliferation of the number of bargaining units. Thus, although Congress recognized that "the Board should be permitted some flexibility in unit determination cases," the Board was exhorted to exercise "great caution . . . in reviewing unit cases in this area."[16] In addition to the previously discussed legislative history, which is also relevant to the instant discussion, we note the following statement by Senator Taft:

> The issue of proliferation of bargaining units in health institutions has also greatly concerned me during consideration of legislation in this area. Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. *If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care.* [Emphasis supplied.][17]

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[15]The parties stipulated that pharmacies and medical laboratory technologists are professional employees within the meaning of Sec. 2(12) of the Act. In addition, in the absence of any request for review of the Regional Directors findings thereto, we find that physical therapists, dieticians, and radioisotope technologists are professional employees within the meaning of the Act.

[16]120 Cong. Rec. S. 6940 (1974).

[17]*Ibid.*

We do not minimize the differences, both functional and educational, which exist among the various groups of professional employees employed by the Employer. However, based on the record before us, to grant a separate unit to all such professional groups and job classifications would, as pointed out in the legislative history, result in what might be deemed an *undue* proliferation of bargaining units. Thus, although there is a diversity of skills between each of these professional groups, their skills, interests, and working conditions are, in many respects, no more diverse than those of employees in a production and maintenance unit in the industrial sphere or in the overall service and maintenance unit in the health care industry. Despite these differences, we note that all of the employees here under consideration possess a commonality of professionalism which sets them apart from other employees in the Employer's operations.

In addition, these individual professional groups have failed to demonstrate the kind or degree of separate representation for collective-bargaining purposes which was so important to our finding that registered nurses may constitute a separate professional bargaining unit. Thus, despite the number of professional associations, of which we learned from various parties and *amicus* participants in the oral arguments, none has demonstrated the development of such a tradition of separate collective bargaining as has been the case with registered nurses.

We therefore conclude that a separate unit of medical laboratory technologists is not appropriate. Plainly, the record does not establish a compelling tradition of separate representation or separate collective-bargaining history for

medical laboratory technologists. The record does establish, however, that medical laboratory technologists share an identifiable community of interest with other professional employees. Thus, like other professionals, medical laboratory technologists are required to hold a baccalaureate degree in their respective specialty supplemented by additional training and/or licensure, perform at least some of their regular work on the nursing floors and in the patient rooms, are directly involved in the treatment of patients, and share common wage scales, benefit programs, and working conditions.

Accordingly, for the aforementioned reasons and based on the record in the instant case, we conclude that a unit consisting of all professional employees, excluding registered nurses,[18] would be appropriate for the purposes of collective bargaining. However, inasmuch as no labor organization has indicated that it desired to represent em-

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[18] We do not consider and we do not pass on the question whether, in the absence of a separate petition seeking registered nurses only, we would direct an election in an overall professional unit, including registered nurses, if such a unit were sought, or whether, if we did, we would allow the nurses a voice as to whether they wished to be included in a unit with other professionals. Compare *Sonotone Corporation*, 90 NLRB 1236 (1950). By the above language, we do not mean to suggest, as intimated by our concurring colleague, that if only an all professional unit is sought, nurses may possibly be given a separate vote entitling them to remain unrepresented. Although the Petitioner expressed a willingness to represent employees in such an overall unit and not to contest the Regional Director's findings thereon, we do not construe that expression of willingness to have been the Petitioner's primary position. We will, of course, entertain a new petition for a unit encompassing all professional employees, excluding registered nurses, should one be filed, based on a proper showing of interest.

We do not here reach the question whether we would find appropriate a unit limited to physicians, residents, or interns. Cf. *New York University Medical Center, A Division of New York University*, 217 NLRB 522 (1975).

ployees in such an all-professional unit should a separate unit of nurses be found appropriate, we shall not direct an election in the aforementioned unit.

2. Service and maintenance employees

The Petitioner originally petitioned to represent a unit consisting of all of the Employer's service employees and Local 39 originally sought to represent only those employees in the Employer's maintenance and engineering department. However, on January 2, 1975, the Petitioner and Local 39 filed with the Regional Director a joint request to appear on the ballot as a joint petitioner in an overall service and maintenance unit consisting of all of the aforementioned employees and, if successful in an election, to be certified as a joint petitioner. On January 3, 1975, the Regional Director issued a notice to show cause why the joint request should not be granted and, on January 13, the Employer filed a statement in opposition. Thereafter, the Regional Director, on February 4, 1975, transferred the joint request to the Board for decision.

We hereby grant the Petitioner's and Local 39's joint request to appear on the ballot as a joint petitioner with respect to a bargaining unit consisting of all service and maintenance employees employed by the Employer. In the absence of any request for review of the Regional Director's decision with respect thereto,[19] we find that all service and maintenance employees employed by the Employer comprise a unit appropriate for collective bargaining

[19]The Petitioner and Local 39 agreed to withdraw their requests for review of that portion of the Regional Director's decision finding appropriate an overall service and maintenance unit in the event that their request to be a joint petitioner were granted.

within the meaning of the Act and we shall direct an election therein.[20]

3. Clerical employees

The Petitioner petitioned for a unit of all office clerical employees employed at Mercy San Juan. The Regional Director directed an election in a unit consisting of all office clerical employees employed at all of the Employer's facilities. While, as indicated heretofore, we agree with the Regional Director's determination with respect to the scope of the unit, we do not, for the reasons hereinafter expressed, agree with his findings concerning the composition of that unit.

Upon due consideration, we have decided that in the health care field, as in the industrial sphere, we shall continue to recognize a distinction between business office clerical employees, who perform mainly business-type functions, and other types of clerical employees whose work is more closely related to the function performed by personnel in the service and maintenance unit and who have, in the past, been traditionally excluded by the Board from bargaining units of business office clerical employees. Thus, the Board has consistently recognized that the interests of business office clerical employees differ markedly from the interests of clerical employees who work in the production areas and has declined to establish bargaining units composed of the two clerical groups.[21]

[20]See *Mount Airy Foundation d/b/a Mount Airy Psychiatric Center*, 217 NLRB 802 (1975). But see *St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.*, 217 NLRB 787 (1975).

[21]*General Electric Company (River Works)*, 107 NLRB 70 (1953). These distinct interests are rooted in community of interest considerations, including the performance of different functions for different purposes in separate work areas under separate supervision. See, e.g., *Minneapolis-Moline Company*, 85 NLRB 597, 598 (1949).

Therefore, in the health care industry, we shall normally find as separately appropriate those units of office clerical employees which consist of business office clerical employees.[22] In addition, as the interests of other types of clerical employees are more closely related to the functions served by employees in the service and maintenance unit, we shall include such clerical employees in the service and maintenance unit.

Our finding herein is consistent with the congressional direction against the undue proliferation of bargaining units in the health care industry. Thus, the legislative history of the health care amendments indicates that Congress recognized the possible appropriateness of separate bargaining units among employees who have a history of separate representation,[23] as do business office clerical employees.[24] We also note that the inclusion of other types of clerical employees in the service and maintenance unit herein found appropriate avoids unnecessary fragmentation of employees who share common interests and is therefore in keeping with the congressional mandate.

Accordingly, for the aforementioned reasons, we find that a unit consisting of all business office clerical employees, excluding all other employees, is appropriate for

[22]To the extent that it is inconsistent with the decision in the instant case, we hereby overrule the decision in *National Medical Hospitals, Inc. of San Diego, d/b/a Chico Community Memorial Hospital*, 215 NLRB No. 155 (1974), which issued prior to the direction of oral arguments concerning issues of unit composition in the health care industry.

[23]See discussion, *supra*.

[24]See cases cited in fn. 21, *supra*.

the purposes of collective bargaining and we shall direct an election therein.[25]

4. Supplemental employees

The record establishes that the Employer employs approximately 200 supplemental employees, most of whom are regular part-time employees working less than 40 hours per 2-week pay period or on a temporary or an "on-call" basis. Supplemental employees generally serve as "float personnel" working where needed to supplement the work force in many service and maintenance departments. Need for these employees necessarily fluctuates with the varying patient census in the Employer's facilities. In many instances, new employees are hired as supplemental employees and subsequently become part-time and then full-time employees.

The parties disagreed as to whether or not the supplemental employees should be included in the bargaining unit. While the Employer would include all supplemental employees, the Petitioner and Local 39 would include only those supplemental employees who are obligated to perform weekend rotation work and who are eligible to participate in the Employer's benefit programs or, alternatively, would allow the Board to establish an arbitrary standard of voter eligibility based on the number of hours worked. However, in the absence of any agreed-upon equitable eligibility formula and inasmuch as the record is silent as to the length, regularity, and currency of the employment of supplemental employees, we shall merely permit, as did

[25]The parties stipulated to the classifications of employees to be included in the office clerical unit. See the unit description, Voting Group C.

the Regional Director, all supplemental employees who work on a regular part-time basis to vote in the election.

CONCLUSION

Accordingly, upon the entire record and for the aforementioned reasons, we shall direct elections among employees in the following units which we have found to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT A

All registered nurses and nurse permittees employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California; excluding all other employees, guards, and supervisors as defined by the Act.

UNIT B

All full-time and regular part-time service and maintenance employees, including licensed vocational nurses, graduate vocational nurses, nurse assistants, ward clerks, surgical technicians, ACC clerks, x-ray technicians, cardiopulmonary technicians, respiratory therapy technicians, EKG technicians, tissue technicians, EEG technicians, pharmacy technicians, pharmacy clerks, computer programmers, printing assistants, technicians to receiving clerk, housekeeping technicians, food service workers, laundry workers, department aides, all employees of the maintenance and engineering department, and all clerical employees other than business office clerical employees, employed

at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California; excluding all other employees, guards, and supervisors as defined by the Act.

UNIT C

All business office clerical employees, including clerks 1, 2, and 3, keypunch operators, keypunch operator trainees, computer operator 1's, senior transcribers, and PBX operators, employed at Mercy General Hospital, Mercy Convalescent Hospital, and Mercy Children's Hospital, Sacramento, California, and at Mercy San Juan Hospital, Carmichael, California; excluding all other employees, confidential employees, guards, and supervisors as defined by the Act.[26]

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[26] Contrary to the position ascribed to us by Member Kennedy, we are not ignoring the normal showing of interest requirement. Rather, since we are enlarging the size of the bargaining units with respect to registered nurses and business office clerical employees, we shall not permit the Regional Director to conduct elections in such units unless and until the labor organizations involved submit timely showings of interest which warrant the conduct of an election in such enlarged units. Although we have been administratively advised that the Regional Director, at an earlier date, requested the labor organizations involved to submit new showings of interest based on the unit determinations in his decision, we note that those unit determinations were tentative and, of course, review was thereafter sought on various grounds. In the light of these facts, and the further fact that no party could at that time, with any degree of certainty, know what unit or units in this newly covered industry would be found appropriate, we are unwilling to dismiss these petitions on grounds that, shortly after the Regional Director's decision, some showing of interest requirements may not have been met. We believe it appropriate to direct the Regional Director to ascertain the parties' showing of interest at this time with respect to the units here found appropriate.

[Direction of Election omitted from publication.][27]

Member Fanning, concurring:

This hospital complex is operated at two locations, approximately 13 miles apart. Originally the Petitioner sought units at Mercy General, Sacramento, and separately at Mercy San Juan (also a general hospital) at Carmichael. At the hearing there were several interventions, one by CNA for all registered nurses of the Employer hospitals; presumably this included the Mercy Convalescent and the Mercy Children's Hospital operated at Sacramento. Noting that the parties agreed that the Convalescent and the Children's Hospitals should be considered part of Mercy General, the Regional Director found, on the record made, that the four facilities constitute a *single employer* under the Act, and that appropriate units should encompass employees at all four facilities. In the circumstances of this case, with the Employer urging a four-facilities unit and the Petitioner and Intervenors agreeing at oral argument to a unit of this scope, I agree with this finding. I would point out, however, that a single employer finding does not necessarily carry with it a finding that units employer-wide in scope are also appropriate. This will depend, in cases where the parties do not agree, on what the facts show as to the autonomy of a single location hospital facility. I see nothing in the legislative history concerning nonprofit hospitals to indicate that single location units, such as are presumptively appropriate in industry generally, were meant to be discouraged.[28]

[27][*Excelsior* fn. omitted from publication.]

[28]I note that now pending before this Board is *Presbyterian Medical Center*, 218 NLRB No. 192 (1975), where the employer is urging that another hospital operated by it 13 miles away should not be included in the same unit.

I am in complete agreement with giving registered nurses a separate unit when they are sought to be represented on that basis.[29] They are a distinct group among the professional employees in the health care industry, and have a marked community of interest in bargaining collectively on that basis. Nursing care of patients is a round-the-clock, every day responsibility. It is perhaps because of this that RN's have a long history of separate representation for collective bargaining—often as the result of voluntary recognition—and many units of RN's have been established through the processes of this Board. If, however, they are not sought separately but only as part of an all professional unit, or possibly a residual professional unit, I would include them in such units without a separate vote.[30]

Consistent with the professional capacities and common interest of all RN's, I would include in the unit not only the RN's in the Employer's department of nursing, but also the 27 assigned to other departments in these hospitals. As found by the Regional Director, nine RN's are permanently assigned to the laboratory department, which is work that takes them to patient rooms to take blood samples and throat cultures, insert tubes for gastroenterology, and to be available in the event of a problem with the patient.[31]

[29]I would include the nurse permittees, as my colleagues do.

[30]This is somewhat like the Board's inclusion of skilled crafts in production and maintenance units if not separately sought. However, I see no need to suggest, as my colleagues do, that, if only an *all* professional unit is sought, nurses may possibly be given a separate vote entitling them to remain unrepresented. There is no statutory support for a *Sonotone*-type election as between professional employees.

[31]It appears from oral argument that these RN's work independently of the medical laboratory technologists whose function it is to

One RN is assigned to the radiology department to assist and observe the patient in what may be a difficult situation, including the injection of dye into the vascular system. Three RN's are assigned to the cardiopulmonary department, which also includes work on nursing floors. Some RN's—the number not appearing in the Regional Director's decision—are assigned to internal medicine. This involves emergency calls to patient rooms accompanied by respiratory technicians. Cardiac arrests and tracheotomies are treated. The Employer employs eight radioisotope technicians in its nuclear medicine department. Six of these are RN's and one a former LVN. All received additional training in nuclear medical technology. They inject radioisotopes into the blood stream and operate scanning machines. For this work only RN's or those with formal training in nuclear medicine are considered as applicants.[32] Both Petitioner and Intervenor CNA are seeking to represent *all* RN's. In my view there is no reason not to include in the unit those RN's assigned to hospital departments other than the nursing department simply because these departments are separately supervised. It is not possible for the Board to grant a multiplicity of departmental units within a hospital without the undue proliferation which concerned the Congress. Therefore, in view of the patient-related function of all RN's and their background of professional training to that end, it seems reasonable and appropriate

perform the laboratory tests, having satisfied California licensing requirements for that purpose. Supervision of these RN's by the chief laboratory technologist is said to be "of a functional rather than a technical nature."

[32]The Regional Director found that these radioisotope technicians were professionals, noting that the group was predominantly composed of individuals with a baccalaureate degree in nursing, plus additional highly specialized training.

to group together in the RN unit all RN's wherever assigned in these hospitals.[33] Unlike my colleagues I see no necessity to vote these RN's subject to challenge.

Head Nurses: Among the approximately 300 RN's here involved there are 13 classified as head nurse, 3 being employed at Mercy San Juan. Depending upon their area of assignment they report to the director or the assistant director of nursing or to a nursing unit supervisor, classifications stipulated to be supervisory. The Regional Director found them to be supervisors and there is no request for review of this finding as to these head nurses. I agree with it in the circumstances. I would point out, however, that the term "head nurse" does not necessarily involve supervisory authority as defined in Section 2(11). It may involve only 2(12) professional direction.[34] At oral argument CNA stressed the importance of determining the supervisory issue on the basis of whether the RN's alleged to be supervisors actually have interests other than patient care. Decisions by RN's, including assignments to orderlies and aides, are made from a patient care standpoint. On the other hand, a director of nursing obviously must consider the interests of the Employer as well and is a supervisor as was stipulated here. But the fact remains that many RN's may have been given titles that suggest that they are 2(11) supervisors, whereas they do not exercise their authority "in the interest of the employer" within the meaning of that section, but rather as professionals

[33]This would include the two RN's who work in the admitting department and those assigned to the educational training department.

[34]See discussion in my dissent in *David-Anna Corporation d/b/a Snyder Bros. Sun-Ray Drug*, 208 NLRB 628 (1974), concerning head pharmacists.

directing other professionals or subprofessionals as contemplated by Section 2(12)(b) of the Act.

My colleagues, having found an RN unit appropriate, interpret the Act and its legislative history as authorizing a finding that all professional employees excluding RN's—except possibly excluding physicians, residents, and interns—are necessarily an appropriate unit. Intervenor CAMLT originally sought a unit of medical laboratory technologists, an employee group to which this Board granted "severance" from a mixed professional and nonprofessional unit that had been voluntarily established without a separate vote for the professional employees under Section 9(b)(1).[35] At oral argument CAMLT expressed a much broadened interest, in an all professional unit excluding nurses, and "doctors" as well. My colleagues direct no election in that unit but would entertain a petition—with proper showing of interest—for all professionals excluding RN's. In this case I agree with this result. Other cases now pending before the Board present the issue concerning bargaining for interns and residents and/or medical staff physicians. However, I do not believe that it is wise for this Board to appear to foreclose the appropriateness of any other professional group. To my mind it is consistent with the purpose of this new legislation to view Congress' nonproliferation admonition as limited to the specific hospital entity involved and its bargaining pattern or lack of it. I have no thought, of course, of recognizing every professional interest with a separate professional unit, but I do believe that the Board should allow some room for the pattern organizational development may take and not cast

[35]See *The Permanente Medical Group*, 187 NLRB 1033 (1971).

in a mold certain units as the only permissible ones. Congress itself declined to do that. We are simply urged to avoid proliferation with respect to the problems of whatever hospital is under consideration by reason of a representation petition or petitions.

The service and maintenance unit here found appropriate includes admittedly skilled painters and carpenters,[36] as well as stationary engineers, the latter having had a separate bargaining history in a multiemployer unit to which this Employer was a party until 1970. Separate bargaining for stationary engineers working at hospitals in northern California appears to be an area pattern. Here Local 39 sought to add the skilled maintenance employees. Later Local 250, seeking the service employees, and Local 39 sought joint representation of a combined service and maintenance unit. I agree with my colleagues in granting that request. I would note, however, that the legislative history does not foreclose traditional craft and departmental units, such as stationary engineers, in the health care field or preclude consideration of area practice.[37] I would construe this as not foreclosing a traditional maintenance department unit on initial organization.[38]

I agree with the appropriateness of a unit of business office clericals in this industry. In addition, although there

[36]The sense of Employer's presentation at oral argument was to admit these skills.

[37]See the dissenting opinion in *Shriners' Crippled Children's Hospital*, 217 NLRB 806, issued this day.

[38]This service and maintenance unit includes some employees the Board is finding to be technicals in *Nathan and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center*, 217 NLRB 775 (1975). As there is here no union seeking to represent technical employees separately, I agree that there inclusion in this instance is appropriate.

are obvious differences in health care as compared with industry in its broad sense, I believe that those clericals who work away from the business office—on various floors of the hospital—are, like plant clericals, appropriately included in a service and maintenance unit with the non-professionals who also work on the various hospital floors and with whom they come in contact. In fact, in a hospital, a service and maintenance unit is essentially the counterpart of a production and maintenance unit.

Member Kennedy, dissenting in part:

I join my colleagues in their unit determinations except their finding that a registered nurses unit is appropriate. I would affirm the Regional Director's finding that a unit of all professional employees is appropriate. My colleagues correctly direct an election in the service and maintenance unit, but they err in directing elections in the registered nurses unit and in the business office clerical unit because no union has submitted an adequate showing of interest in either of those units.

It is significant that both the Employer and the Petitioner in these cases are in "complete agreement with the decision of the Regional Director."[39] I do not agree with the views

[39]The Employer herein filed a 100-page brief in opposition to the Request for Review. Counsel for the Employer urged at the oral argument that the "Board sustain the Regional Director's decision in its entirety."

At the oral argument Member Fanning asked counsel for Petitioner, "if I understood what you are saying, you are now in *complete agreement* with the decision of our Regional Director?" Counsel Van Bourg replied, "That's the position that we are taking, insofar as the Mercy case is concerned." At another point the same counsel for Petitioner stated:

> It is true that in many decisions nurses have been treated separately, but if you are now to treat the position of the

expressed by my colleagues in footnote 18. I construe the statements of Petitioner's counsel set forth below in footnote 39 to be a clear expression of willingness to proceed to an election in a unit of all professional employees. I do not construe the statements of counsel at the oral argument to mean that Petitioner's "primary position" is to have an election in a registered nurses unit.

In my view, an all professional employee unit is not only *an* appropriate unit but it is the "most appropriate unit." I recognize that Section 9 of the Act has been construed to mean that the Board is not required to direct an election in the "ultimate unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate.' "[40]

I do not suggest that in no circumstances would I find a unit limited to registered nurses to be appropriate.[41] Such determination must be based on the relevant facts in each case. I do not believe the two factors stressed by my

> amendments to the Act in context with what the Board has done previously with respect to professional units, then I think that the statement of position by Mr. Asher is well taken; namely, that if we take out each group of professionals and treat them and deal with them separately, eventually we will have substantial groups of unrepresented people, because as a practical matter that portion of the Act which favors organization will be thwarted.
>
> I think that an all-professional unit in a given case, particularly such as the case in Mercy, is appropriate. Community of interest need not be one that deals with a product or with a patient. It could be the method of remuneration, how the people interact with each other, how they meet, where they deal with the total aspect of the employer's operation, and I think that an all-professional unit clearly as in the case of the Mercys it can be defined as such.

[40]*Morand Brothers, Beverage Co.*, 9 NLRB 409 (1950), enfd. 190 F.2d 576 (C.A. 7, 1951).

[41]I think it desirable to point out that I have agreed with my colleagues in finding a unit of business office clerical employees to be

colleagues justify a registered nurses unit in the face of Petitioner's expressed willingness to go to an election in an all professional unit.

The first factor stressed by my colleagues is the "complete authority over registered nurses in hospitals is centralized in the director of nursing and all hiring, firing, and regulating of working conditions, such as hours, shifts, and job descriptions, take place within the confines of the department of nursing." The second is "their singular history of separate representation and collective bargaining." The first point might be persuasive if I found it supported by the record in this case. There are 27 registered nurses who are not a part of the Nursing Service Department. They work in the radiology, laboratory, business office, educational training, cardiopulmonary, internal medicine, and intravenous therapy departments and report to the supervisors of those departments. It is clear that the registered nurses in the laboratory work along side the medical laboratory technologists, perform many of the same tasks, and are supervised by the chief laboratory technologist. On the second point, I do not propose to set forth a treatise reviewing the history of nursing. I note, however, that this "singular history of separate representation" is not entirely

appropriate. I do so because of the facts in this case and because of the agreement of the parties. I note also that the election in the service and maintenance unit will be conducted with Local 250 and Local 39 appearing on the ballot as joint petitioners. Only Local 250 seeks to represent the business office clerical unit. My agreement with the result in this case should not be interpreted as complete agreement with the rationale stated by my colleagues with respect to the business office clericals. I do not subscribe to the view that business office clericals can be represented *only* on the basis of a separate unit. See my partial dissents in *St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.*, 217 NLRB 787, issued today, and *Mount Airy Foundation, d/b/a Mount Airy Psychiatric Center*, 217 NLRB 802, issued today.

unrelated to sex consideration. Accordingly, I am not inclined to attach the same degree of importance to it as my colleagues.

I think it significant that, with respect to those registered nurses who are assigned to the Nursing Service Department, there is a constant interrelation of duties and community of interest with other professional employees. The record shows the registered nurses and pharmacists work together in formulating patient profiles for medication and insuring that the various drugs prescribed for each patient are compatible with one another. Pharmacists frequently consult with the registered nurses to determine a patient's reaction to a particular drug. Medical laboratory technologists work closely with the registered nurses in patient rooms and on the nursing floors drawing blood, taking throat cultures, and obtaining laboratory specimens. Physical therapists work with the registered nurses to help the patient regain mobility after a serious operation or a long convalescence. Dieticians and the registered nurses must work together to insure that the patient's diet is acceptable. All professional employees receive identical treatment under the Employer's wage and benefit programs.

On considering the particular facts in this case, the diversity of supervision and functions performed by the various registered nurses, I conclude the registered nurses do not have a sufficiently distinct community of interest apart from the other professional employees as to warrant their establishment as a separate unit.

Assuming, *arguendo*, that my colleagues are correct in finding units of registered nurses to be appropriate, their

direction of election in the nurses and clerical units is contrary to longstanding policy that the expenditure of Agency time, effort, and funds should be avoided where it appears that the request for election is not supported by a "substantial number" of employees in the unit.[42] The Board has long followed the rule that 30 percent constitutes a "substantial number." Section 101.18(a) of the Board's Statements of Procedure. The showing-of-interest requirement enables the Board to determine whether or not the holding of an election is warranted.

Shortly after the Regional Director's Decision herein the inadequate showing of interest came to the attention of the Regional Director.[43] The Regional Director notified the parties of the inadequacy of the showing of interest and that additional evidence of interest should be submitted.[44] We have been administratively advised by the Regional Director that no additional showing of interest has been submitted. Based on the information furnished administratively by the Regional Director, it is clear that no union has

[42]See Sec. 9(c)(1)(A) of the Act.

[43]In Case 20-RC-12301 the unit sought was limited to the 100 registered nurses at the Mercy General Hospital. There are approximately 300 registered nurses employed at both Mercy General and the Mercy San Juan facility. Similarly, the unit sought in Case 20-RC-12302 was limited to the business office clericals at Mercy San Juan and constituted less than one-half of such clericals in the unit for the combined facilities.

[44]The Employer submitted lists of eligible voters promptly after the Regional Director directed elections in these cases and specifically questioned whether any labor organization had submitted a 30-percent showing of interest in either the professional unit or the clerical unit. The Regional Director advised the parties that no election would be conducted in these units because of the lack of showing of interest.

as much as a 10-percent showing of interest among the employees in either the nurses' or clerical unit.[45]

Directing elections under the foregoing circumstances in these two units violates longstanding policy of this Agency. There is nothing in the legislative history which remotely suggests that Congress intended that we should waive our usual interest showing requirements in the health care industry. Accordingly, I dissent from my colleagues' direction of elections in the registered nurses' unit as well as in the unit of business office clericals.

[45]Fn. 26 of the majority opinion states that the Regional Director shall not "conduct elections in such units unless and until the labor organizations involved submit timely showings of interest which warrant the conduct of an election in such enlarged units." Better practice requires dismissal of these petitions where, as here, there is less than a 10-percent interest showing in the units found appropriate. These petitions have been on file for many months without a proper showing of interest having been submitted. No time is specified by the majority for the production of the additional showing of interest and the petitions may remain on file for several more months before any action is taken. This poses an unnecessary impediment upon the Employer in conducting its operations. It forecloses participation by other labor organizations who may now have an interest in organizing these employees from utilizing the Board processes either as a petitioner or an intervenor even though there has never been on file a properly supported petition.